



FIRST PIP COMPETITION 2012

The MRHD IP Chair at the National University of Juridical Sciences,
Intellectual Property and Technology Law Society (IPTLS) & Spicy IP
proudly announce the
First PIP (Pondering Intellectual Property) Competition, 2012



Topic
**Should the process of creating an invention
or work determine its protectability as an intellectual
property?**

Entries adjudged by

PROFESSOR DAVID VAVER, *Professor of Intellectual Property Law, Osgoode Hall Law School*

PROFESSOR LIONEL BENTLY, *Herschhel Smith Professor of Intellectual Property, University of Cambridge*

RANDALL R. RADER, *Chief Judge of the United States Court of Appeals for the Federal Circuit*

PROFESSOR GRAEME DINWOODIE, *Director of the Oxford Intellectual Property Research Center, University of Oxford*

PROFESSOR SHAMNAD BASHEER, *MHRD Chair Professor in IP law at the National University of Juridical Sciences, India*

WINNER

Pervin Rusi Taleyarkhan
Indiana University Robert H. McKinney School of Law
pervinrt@gmail.com



Intellectual Property

Protecting the Intellect or the Property?

Pervin Rusi Taleyarkhan

I. INTRODUCTION	2
B. ROADMAP	3
II. INTELLECTUAL PROPERTY’S COMMON ROOTS: ALL IP STARTS AT THE SAME PLACE....	3
A. THE ULTIMATE ORIGIN OF ‘ALL’ INTELLECTUAL PROPERTY: THE HUMAN BRAIN	3
B. CREATIVITY IN INTELLECT: AN EXAMPLE.....	5
III. LEGAL RECOGNITION OF THE VARIED APPLICATION OF BRAIN POWER BEHIND IP: PATENTS, COPYRIGHTS, TRADEMARKS, & TRADE SECRETS	6
A. PATENT LAW: PROTECTING NEW, USEFUL, & NON-OBVIOUS INVENTIONS.....	6
B. COPYRIGHT LAW: PROTECTING ORIGINALITY IN TANGIBLE CREATIVE WORKS.....	7
C. TRADEMARK LAW: PROTECTING THE CONSUMER FROM DECEPTION	8
D. TRADE SECRET LAW: LEGAL RECOGNITION OF A COMPETITIVE EDGE	9
IV. CONCLUSION: “PROCESS IS WHAT YOU PAY, PROTECTION IS WHAT YOU GET”	10

I. INTRODUCTION

*Price is what you pay, value is what you get.*¹

The ten simple words that appear above summarize multi-billionaire investor Warren Buffet’s philosophical stance on investing. This philosophy emphasizes that there is a crucial difference between price and value.² That is, in the investment world it is important to recognize the reality that stock market *prices* are both volatile and rarely accurate, a natural result of humans being humans, prone to regularly getting “carried away by periods of ‘irrational exuberance’ or ‘bouts of panic.’”³ Contrarily, the *value* of the company largely remains stable, mainly because when purchasing a share of a company, the investor buys into the assets⁴ of the business, the value of which ultimately depends on how the business itself is structured.⁵

This powerful notion of a distinction between price and value, which arguably meant a world of difference to Warren Buffet, can be readily applied to the world of intellectual property (IP). The process of creating an IP is related to Warren Buffet’s

¹ Report to shareholders, Warren Buffet, *Berkshire’s Corporate Performance vs. the S&P 500*, at 5, 29 Feb. 2009, available at www.berkshirehathaway.com/letters/2008ltr.pdf (referring to the teachings of Mr. Buffet’s teacher in investing, Benjamin Graham).

² Edward Rizzo, *Price is what you pay, value is what you get*, TIMES OF MALTA, Jan. 20 2011, <http://www.timesofmalta.com/articles/view/20110120/business-features/price-is-what-you-pay-value-is-what-you-get.346185>.

³ *Id.*

⁴ These assets can be “tangible assets (such as property, equipment and financial assets) as well as intangible assets such as the goodwill or brand name.” *Id.*

⁵ *Id.*

reference to the price “paid” for the IP,⁶ and Mr. Buffet’s concept of “value” refers to the value placed on the invention or creative work itself (that is, the IP). Just as the price paid for a share in a company should not be considered indicative of the value of a company (and one must thus analyze the business itself to gain a sense of its value), so too is the process for creating an IP rarely a true, or even a fair, indicator of the protection the IP deserves.

A. INTELLECTUAL PROPERTY: A “SHARE” IN THE QUEST FOR KNOWLEDGE

There is little doubt that IP serves a critically important role in most nations’ economies and on their standards of living. This is evidenced, particularly in developed countries, by the sophisticated measures many of these nations’ countrymen take to protect their IP.⁷ Indeed, IP has been described as the economic exploitation of “knowledge and information.”⁸ Furthermore, “[i]ntellectual capital is recognized as the most important asset of many of the world’s largest and most powerful companies.”⁹ In order to understand the reasoning behind so many societies’ recognition of intellectual products as protectable “property,” and thus answer the oft-posed policy-based question of exactly what we should be protecting (*i.e.*, the creation, or the process of creating it), it is necessary to delve deeper into the source of it all: the intellect (or, more precisely, *the human brain*).

After the fundamentals of the mind’s creative processes are considered, it becomes clear that, analogous to Warren Buffet’s investment philosophy, arriving at an IP is effectively issuing a share in the business of exploiting knowledge and information. Thus, the IP’s value is determined by the quality of such knowledge or information, which is embodied in a creative work or invention, and not by the process utilized to arrive at it.¹⁰ Put simply, and in tune with Warren Buffet’s notion, the price paid or the process of arriving at an IP, should not be considered if one seeks to accurately judge the protectability or value of a creative work or invention.

⁶ The price “paid” for the IP can be in the form of individual or group talent, time commitment, energy, labor, and even financial expenditure.

⁷ In many companies, the pharmaceutical industry for instance, intellectual property “is much more valuable than any physical asset. Authoritative sources report that each year, intellectual property theft costs [United States] companies about \$300 billion.” Derek Slater, *Intellectual Property Protection: The Basics*, CSO Data Protection (2012), <http://www.csoonline.com/article/204600/intellectual-property-protection-the-basics>.

⁸ Monisha Deka, *Pre-Professional Intellectual Property Education*, 46 IDEA 143, 143 (2005) (quoting Rita Hayes, *Speech, Promoting Intellectual Property for Economic Growth*, 36 Vand. J. Transnatl. L. Vol. 73, 795 (2003)).

⁹ Kelvin King, *The Value of Intellectual Property, Intangible Assets and Goodwill*, WORLD INTELLECTUAL PROPERTY ORGANIZATION PROGRAMS AND ACTIVITIES: SMALL AND MEDIUM-SIZED ENTERPRISES (2003), http://www.wipo.int/sme/en/documents/value_ip_intangible_assets.htm.

¹⁰ It shall be demonstrated that while the process of creating the IP should have no legal recognition per se, the creative or inventive processes are nevertheless more than adequately recognized in circles outside the legal world. This, as will be discussed further in Section II, includes press attention and general acclaim in the inventor or author’s social and professional circles.

B. ROADMAP

This article explores the reasoning behind the argument for excluding the process of creating or inventing as a factor in determining the legal protection of a work or invention, starting at the fundamental, mental level, where all IPs begin. It will further substantiate this argument with a discussion of how nations have generally recognized this argument, and implemented it in their IP policies for the four main bodies of IP law (patents, copyrights, trademarks, and trade secrets). Accordingly, Section II of this article begins by analyzing the ground from which all IP sprouts, the human mind, and how it supports the argument for a process-product distinction in IP protection. Section III will follow by summarizing how the four main IP bodies of law (with the arguably limited exception of trade secret law) achieve the goal of protecting the “thing created” rather than the process of creating it. Finally, Section IV closes with an overview of the main points covered herein, and leaves the reader with a sound takeaway message derived from Warren Buffet’s investment philosophy, customized for application to the IP realm.

II. INTELLECTUAL PROPERTY’S COMMON ROOTS: ALL IP STARTS AT THE SAME PLACE

It is beneficial to discuss where IP ultimately begins when arguing for or against a policy to protect based on the process of producing the IP, as opposed to factoring in just value of the IP itself. After all, protection for such “property” would not be the subject of controversy at all if there was no respect for the power of one’s intellect: the brain.

A. THE ULTIMATE ORIGIN OF ‘ALL’ INTELLECTUAL PROPERTY: THE HUMAN BRAIN

The human brain “is the most complex organ in the human body[, producing] every thought, action, memory, feeling and experience of the world.”¹¹ Physical evidence of the astonishing complexities in the interactions of the mind’s biological components is readily apparent in each individual’s strengths and weaknesses.¹² These strengths and weaknesses are translated into how humans respond to problems and how each human is capable of developing unique solutions to those problems.

¹¹ Helen Phillips, *Introduction: The Human Brain*, NEWSIDENTIST, 4 Sept. 2006, <http://www.newscientist.com/article/dn9969-introduction-the-human-brain.html>.

¹² Brain research has shown that “the complex abilities apparent in individual kids are reflected on the inside, as well as the outside. Parts of the brain involved in reading, math, music, and personal relationships are different – larger or smaller, more or less active – in every child. . . . And perhaps most surprising, scientists have established that learning and practicing certain skills can cause the corresponding brain areas to morph and grow.” Grace Rubenstein, *Brain Imagery Probes the Idea of Diverse Intelligences: MRI scans show that human abilities come in many combinations*, EDUTOPIA, 1 Apr. 2009, <http://www.edutopia.org/multiple-intelligences-brain-research>.

Accordingly, some solutions are found through a painstaking process of trial and error, while others may be seemingly effortlessly, and sometimes “accidentally,” discovered. The same principle applies to the process of creating an artistic or other original work. Some people are considered blessed, for example, with a talent for painting portraits, while others may struggle to accomplish that same task, and may not even be able to create a comparable work at all. But these same individuals who exhibit weaknesses in one area, may find a “balance in talents” by having superior strength in another. It is these differing abilities that grant the world such great wealth in the power of diversity in the ways and methods in which problems can be solved, and in which creativity can be manifested.

Examples of the differing styles of problem solving and creativity in producing works abound. In the musicians’ world, inspiration and one’s unique perspective on life are attributed as governing how a song is written (and even how it is sung),¹³ and some singers claim to have written a song in ten minutes, while certain composers may take an entire lifetime to create one symphony. When discussing paintings, it took Michelangelo four years of labor and planning to complete his famous work on the Sistine ceiling in Italy,¹⁴ and yet, as historians agree, Leonardo Da Vinci spent the same amount of time (four years) to paint the celebrated, yet so much smaller in size, Mona Lisa.¹⁵ In the inventive sector, the glue on the widely used “Post-it® Notes” was not even considered for its present purpose until six years after the glue itself was originally formulated for its then-failed use as a “super glue.”¹⁶ It took a stroke of so-called flash of inspiration to recognize its potential as the ideal glue for temporary paper fixation. At the other end of the spectrum as far as labor and time required to achieve a desired result, Thomas Edison famously arrived at the long-lasting light bulb after experimenting with thousands of different types of filaments to achieve the desired glow and longevity.¹⁷

It would be unfair, and indeed, highly inaccurate, to claim that art lovers gain more pleasure from viewing Leonardo Da Vinci’s Mona Lisa than Michelangelo’s Sistine ceiling painting simply because, arguably, more work per unit area of painting and more agony in getting the work of art “just right” was involved in Da Vinci’s work. Both of these artists invested a great deal of time and effort into their creations, and society values them regardless of the time per unit area of painted surface was put into it. Put simply, if there are so many ways to manifest a product of the mind, why

¹³ See e.g., Robin Frederick, *Notes on Songwriting*, ROBINFREDERICK.COM, <http://www.robinfrederick.com/write.html> (last visited 27 Sept. 2012) (urging aspiring songwriters to consult sources “that have emotional energy” for the writer); see also “Getting Started With Songwriting,” <http://www.writeasong.org/> (last visited 27 Sept. 2012) (explaining that “[s]ongwriting is a great way to express . . . creativity and to share . . . thoughts [and] emotions with others.”)

¹⁴ Indiana University, *The Life and Times of Michelangelo*, <http://cecelia.physics.indiana.edu/life/art/michelangelo.html> (last visited 27 Sept. 2012).

¹⁵ Lairweb, *Mona Lisa*, <http://www.lairweb.org.nz/leonardo/mona.html> (last visited 27 Sept. 2012).

¹⁶ Post-it® Brand Products, 3M, http://www.post-it.com/wps/portal/3M/en_US/Post_It/Global/About/About/ (last visited 27 Sept. 2012).

¹⁷ ENCHANTEDLEARNING, *The Invention of the Light Bulb: Davy, Swan and Edison*, <http://www.enchantedlearning.com/inventors/edison/lightbulb.shtml> (last visited 27 Sept. 2012).

should protection of those solutions be given based on the process one takes to arrive at them?

B. CREATIVITY IN INTELLECT: AN EXAMPLE

History has shown that the most extraordinary discoveries and works have come from truly surprising sources. Take graphene, the strongest material known to mankind, as an example. Graphene is over one hundred times stronger than steel, with a single, one-carbon-atom-thick layer capable of supporting an elephant.¹⁸ Its applications are no less extraordinary. Graphene can be a critical component in manufacturing faster computers, more stable biosensors for diagnosing diseases, lighter satellites, and safer cars.¹⁹ Prior to 2004, few scientists believed such a material could be produced at all, even with the most sophisticated equipment and brilliant scientific minds working to achieve this goal. Then, two physicists surprised the world by discovering graphene using materials found in almost every household in the developed world: scotch tape and pencil lead.²⁰ These two simple ingredients were utilized in the discovery of what has been described as the thinnest and strongest material in the universe.²¹

To be sure, the key components of all noteworthy achievements, hard work and persistence, played a critical role in discovering graphene as well. But what graphene's Nobel Prize-winning discoverers claim as the uniqueness in their approach to their discovery is a research strategy that specifically focuses on "unexplored area[s] of research."²² Of course, graphene is ultimately a naturally occurring compound, and thus not eligible for legal IP protection by patent. However, had it been eligible for protection, it takes no stretch of the imagination to surmise the legal chaos, outrage, and unpredictability that would result if courts and agencies, in granting protection for graphene, were charged with taking into account the unique, non-traditional approaches used to arrive at this monumental discovery. It follows then, and again, if there are so many ways in which a problem can be approached, and if the world's most perplexing mysteries can be solved by extraordinarily simple means (as shown in the graphene example above), why should protection of those solutions be determined by the processes involved in arriving at them, when nature itself proves there is no "fixed equation" for such achievement? The answer is, simply, that it should not.

¹⁸ Charles Roussequx, *Graphene: Amazing Material Found Thanks to Scotch Tape and Persistent Science*, U.S. DEPT. OF ENERGY OFFICE OF SCIENCE, 25 March 2011, <http://science.energy.gov/news/in-focus/2011/03-25-11/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² SCIENCE WATCH, *Author Commentaries – 2008: U. Manchester's Andre Geim: Sticking with Graphene—For Now*, 2008, <http://archive.sciencewatch.com/inter/aut/2008/08-aug/08augSWGeim/>.

III. LEGAL RECOGNITION OF THE VARIED APPLICATION OF BRAIN POWER BEHIND IP: PATENTS, COPYRIGHTS, TRADEMARKS, & TRADE SECRETS

It has been demonstrated from the discussion above that society can benefit from inventions and creative works regardless of the amount of time and energy that has been put toward making realities from the ideas, and thus the process involved in arriving at an IP can be largely indeterminate of the IP's ultimate value to society. The focus of IP protection, therefore, should rest on said *value*, and not on the process used to arrive at it. The United States' IP policies, for example, regard "[IP] rights as comparable to rights to physical property,"²³ and provide an excellent example of protection focused on the IP rather than the process of creating the IP. The four main bodies of IP law in the vast majority of World Intellectual Property Organization ("WIPO") member states,²⁴ which are patent law, copyright law, trademark law, and trade secret law, and their role in furthering the notion that the product, rather than the road traveled to arrive at it, deserves protection are summarized below.

A. PATENT LAW: PROTECTING NEW, USEFUL, & NON-OBVIOUS INVENTIONS

United States patent law (and copyright law as well, which is discussed further below) traces its roots back to the U.S. Constitution, which grants Congress the power to pass laws to grant time-limited monopolies for certain types of works in order to "promote the progress of science and the useful arts. The economic philosophy of compensating the inventor for sharing his invention with the public was the primary reason for the Patent and Copyright Clause in the [U.S.] Constitution."²⁵ It is important to note the focus is on the *invention*, and the process of arriving at the invention is largely immaterial for obtaining protection. Similar recognition of patentable inventions is afforded by other WIPO member states.

The patent itself is defined by WIPO as "a document, issued, upon application by a government office (or a regional office acting for several countries), which describes an *invention* and creates a legal situation in which the patented *invention* can normally only be exploited (manufactured, used, sold, imported) with the authorization of the

²³ Clarissa Long, *Intellectual Property Rights in the Developing World*, INTELLECTUAL PROPERTY PRACTICE GROUP NEWSLETTER, VOL. 1 (1997), <http://www.fed-soc.org/publications/detail/intellectual-property-rights-in-the-developing-world>.

²⁴ While the United States' IP laws are cited, much of the information contained herein is based on materials from the World Intellectual Property Organization ("WIPO"), of which the United States of America is but one state member. There are currently 185 member states (including most of the world's developed and many developing nations), and the entire list can be requested from WIPO. See WIPO, Member States, <http://www.wipo.int/members/en/> (last visited 30 Sept. 2012).

²⁵ Xuan-Thao Nguyen, *Collateralizing Intellectual Property*, 42 Ga. L. Rev. 1, 6 (2007) (citing U.S. Const. art. 1, § 8, cl. 8, "which states, in part, "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .").

owner of the patent.”²⁶ Further, “[i]nvention’ means a solution to a specific problem in the field of technology.”²⁷ Of note is the fact that there is no mention of the process taken to arrive at the invention. Rather, the protectability of an invention is dependent on whether it encompasses “patentable subject matter, [has] industrial applicab[ility] (usefulness), and possesses novelty, and] it must exhibit a sufficient ‘inventive step’ (be non-obvious).”²⁸ This creates recognition for the inventor’s contribution, while at the same time paying respect to the demonstrable fact that everyone processes information differently and ultimately it is the value that the invention gives to society that is important.

It would be appropriate at this point to point out that the argument for focus on the invention itself should not be interpreted to imply that sheer hard work, struggle, and obstacles overcome are not relevant at all. Indeed, they are recognized, that too, in very significant ways, albeit not necessarily in the legal sense. When a scientist discovers a new drug or an engineer designs a novel sensor for detecting radioactive materials in airports, there is acclaim and recognition for the work that stems from sources outside the legal arena. Regardless of a patent being awarded, the inventor gains a high level of prestige, both in his or her own professional community and, depending on the extent the invention is exposed, recognized, and valued, in the public realm as well. Newspapers may report the inventor’s efforts, and other interested sources may document the inventor’s persistence and his or her triumph over the odds. The inventor may choose to write technical papers for publication in prestigious journals in his or her field of expertise. Professional conferences in the field of invention will surely seek to publicize the work as well. The list goes on and on. In short, the “process” of arriving at the patentable invention is given its due credit in ways that do not and should not require its legal recognition.

B. COPYRIGHT LAW: PROTECTING ORIGINALITY IN TANGIBLE CREATIVE WORKS

“Copyright law is a branch of that part of the law which deals with the rights of intellectual creators.”²⁹ Further,

[c]opyright law, however, protects only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the *choice* and arrangement of words, musical notes, colors, shapes and so on. Copyright law protects the owner of rights in artistic works against those who ‘copy’, that is to say those who take and use the *form in which the original work was expressed* by the author.³⁰

²⁶ WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (2004), at 17, available at <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf> (emphasis supplied).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 40.

³⁰ *Id.* (emphasis supplied).

Here again, the product, not the process used to achieve it, is what should properly be protected. Not only does this method of protection pay respect to the multitudes of ways in which a person can utilize his or her individual talents to create a copyrightable work, it also serves to prevent legal favor of one process of thinking over the other (the choice which, in and of itself, can be a highly subjective consideration, dependent on each individual creator of the original work).

Regarding the process and mode of creation of copyrightable works, there are avenues for non-legal recognition of the “process” involved in creating an original work. For example, if a painter creates a new, unique painting, he or she will gain in popularity, and perhaps even establish social and financial prominence. Here too, newspapers will undoubtedly publicize the author’s success and document his or her road to prominence. Television stations will carry stories commemorating the author’s work, and in all likelihood will also document the “story” behind the creation. The painter may even receive offers to purchase the painting, and the painter’s struggle or the amount of time taken to create that painting may dictate what the “fair market value of the painting” really is when he or she decides whether to accept a particular offer. If the work is unique enough, or even pleasing enough despite its uniqueness, scholars specializing in that particular style of painting may even write articles describing the painter’s work, which will likely include notes on the “inspiration” that guided the painter in creating this work. So, here too is a case where the public reaction and appreciation will serve to account for the “process” of creating the work. The sheer randomness behind public appeal and subjectivity involved in popularity trends in this sector of IP serves to negate any necessity for a policy that affords legal protection that is determined by the “process” used to arrive at a particular result.

C. TRADEMARK LAW: PROTECTING THE CONSUMER FROM DECEPTION

Trademarks trace their roots to the ancient world, where craftsmen cleverly devised symbols unique to themselves in response to a growing need to establish the source of their goods.³¹ With industrialization, the importance of trademarks gained widespread recognition as market-oriented economies began to grow.³² Because competing manufacturers and traders could offer consumers great varieties of goods in similar categories, and the quality and price (among other characteristics) could be equally varied, it became clear that “consumers need to be given the guidance that will allow them to consider the alternatives and make their choice between the competing

³¹ The trademark concept dates back thousands of years. “As long as 3,000 years ago, Indiana craftsmen used to engrave their signatures on their artistic creations before sending them to Iran. Manufacturers from China sold goods bearing their marks in the Mediterranean area over 20,000 years ago and at one time about a thousand different Roman pottery marks were in use, including the FORTIS brand, which became so famous that it was copied and counterfeited.” *Id.* at 67.

³² *Id.*

goods.”³³ As a result, “the goods must be named[, and the] medium for naming goods on the market is precisely the trademark.”³⁴

In trademark law, the idea of the “price paid” (that is, the process) for achieving the IP (the trademark) is somewhat relevant, though indirectly, to the value of the mark. This is because when consumers are enabled “to make their choice between the various goods available on the market, trademarks encourage their owners to maintain and improve the quality of the products sold under the trademark, in order to meet consumer expectations. Thus trademarks reward the manufacturer who constantly produces high-quality goods, and as a result they stimulate economic progress.”³⁵ So here, the “process” for arriving at the IP is somewhat relevant in determining its protectability. For the trademark owner to maintain its right to the mark, it must function to “distinguish the products or services of one enterprise from the products or services of other enterprises.”³⁶ The mark must also not have a “misleading character,” or “violate public order or morality.”³⁷ These “protectable” features of the mark must be maintained by the trademark owner in order to likewise maintain legal protection of the mark, and the test for whether this is accomplished is whether the consumer effectively associates the mark with the source of the goods or services.³⁸

While it is clear that there is indeed effort and ingenuity incumbent on the trademark owner in order to maintain protectability for his or her trademark, aside from the requirement that the mark be “distinguishable,” the rest of the aforementioned “effort” is focused on maintaining consistency in, or even increasing, the quality of the products or services that are provided, which is quite naturally in the owner’s best economic and social interests. So here again, the process of arriving at the distinguishing mark (the trademark) itself is appropriately irrelevant in determining its protectability as an IP. The trademark could have been painstakingly, both physically and financially, arrived at, but if it does not perform its intended function (to allow consumers to associate the mark with its owner), no amount of effort invested can properly serve to afford legal protection to the mark.

D. TRADE SECRET LAW: LEGAL RECOGNITION OF A COMPETITIVE EDGE

Trade secret law would be the most valuable legal IP sector to a proponent for the idea that the “processes” involved in arriving at an IP should determine the IP’s protectability. “Trade secrets are protected against unauthorized use and disclosure by various statutory means[,]” and these provisions vary in each country.³⁹ Depending

³³ *Id.* at 67-68.

³⁴ *Id.* at 68.

³⁵ *Id.*

³⁶ *Id.* at 71.

³⁷ *Id.*

³⁸ *Id.* at 72.

³⁹ “Some countries have special provisions for the protection of trade secrets either under specific legislation on unfair competition or as part of another law. Other countries treat trade secrets as an

on the country, trade secrets often involve contract, tort law, or both, and “a legal definition of a trade secret rarely exists.”⁴⁰ In general, however, protection of trade secrets is largely dependent on several factors, including:

[1] the extent to which the information is known to the public or within a particular trade or industry, [2] the *amount of effort and money expended by the trader* in developing the secret information, [3] the value of that information to the trader and to his competitors, the extent of *measures taken by the trader* to guard the secrecy of the information, [4] the value of that information to the trader and to his competitors, [5] the extent of measures taken by the trader to guard the secrecy of the information and [6] *the ease or difficulty* with which the information could be properly acquired by others.⁴¹

When the above factors are combined with the extra subjective requirement that the “trader involved must have a considerable interest in keeping certain information as a trade secret,”⁴² it is clear that here, the “price paid” (process) to arrive at an IP does play a role in determining its “value” (protectability).⁴³ However, the key difference between trade secret law and the other three forms of IP protection is that the information that is the subject of a trade secret is only protectable to the extent that it *remains* a secret, and trade secrets themselves are not subject to the fully exclusive rights of industrial property law.⁴⁴ So if a competitor discovers the trade secret by legitimate means, or if the trade secret is somehow disclosed (by fair means or foul), the owner of the former trade “secret” may be entitled to legal damages. But the trade secret itself may no longer get protection, for it is no longer a secret, as the principle that “the mere exploitation of another’s achievement is consistent with the principles of a free market system”⁴⁵ generally governs courts’ rulings. Therefore, to an extent, the “price paid” for a trade secret does indeed determine its “value,” but once the secret is discovered (that is, when it is no longer a secret), the amount of work or effort expended to acquire that IP may no longer be relevant for maintaining protection of that trade secret.

IV. CONCLUSION: “PROCESS IS WHAT YOU PAY, PROTECTION IS WHAT YOU GET”

The preceding sections serve to demonstrate that, with the limited exception of trade secrets, it is far more efficient, and accurate, to base protection of an IP upon the value of the IP itself, and to not factor in the process of having arrived at that IP. As also previously mentioned, this argument is not meant to downplay the value of hard work, inspiration, and in some cases, inexplicable luck in arriving at an IP. These

aspect of tort law. Still other countries have enacted criminal, administrative, commercial or civil law provisions prohibiting the unauthorized use or disclosure of business secrets.” *Id.* at 150.

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis supplied).

⁴² *Id.*

⁴³ So long as patent applications are not published by the patent office, inventions that qualify for patent protection can also be the subject of a trade secret. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

processes are usually recognized one way or another by way of press attention, prestige in the author or inventor's field, and in economic success. The events leading to the overall final product are simply too remote from the ultimate value and use of the IP to play a role in the legal and legislative analyses concerning protectability. Moreover, given the various routes and faculties of one's intellect that can be enlisted to create or invent the IP, which is a largely subjective venture, to objectively dictate what kinds of intellectual routes are qualified for heightened protection would lead to widespread uncertainty, and might even discourage people from boarding on certain trains of thought for fear that it will not result in any meaningful protection of any resulting IP. This will inevitably result in failure to capture the true value of the IP. Applying Warren Buffet's investment philosophy of a price-value distinction to process versus protection in intellectual property law, the "Process is what you paid, Protection is what you get."